79-1288

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1979

No. .....

ETHAN WILT and HEATHER WILT, TERESA RACINSKAS and ADAM RACINSKAS, CHRISTOPHER BOEMAN and THOMAS BOEMAN, KATHLEEN TOKE, SHAWN MACK and ANDREA MACK, REGINA HARRIS, DEJONA CEASOR, CORA OWENS, TIMOTHY J. COSGROVE, DANIEL WILT and PEGGY WILT, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Petitioners,

vs.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, VINCENT C. CAMPANELLA, AUDITOR OF CUYAHOGA COUNTY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Text

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, above-named, petition the Court to issue its Writ of Certiorari to review the judgment in cause No. 79-3580, United States Court of Appeals for the Sixth Circuit, by Circuit Judges Engel, Merritt, and Peck, affirming the summary judgment entered against Petitioners by United States District Judge Manos in the Northern District of Ohio in an action claiming rights under the Civil Rights Act of 1871, 42 U.S.C. §§1985(3), 1981, 1982 and 1983-1988, and in support thereof say:

OPINIONS BELOW

The opinion by District Judge Manos, granting summary judgment before trial in favor of Respondents, is not reported but is reproduced in the Appendix hereto under separate cover (A9); the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 608 F.2d 1126, and is reproduced in the Appendix. (A2.)

JURISDICTION

The judgment sought to be reviewed was dated and entered November 2, 1979 (A2); Petition for Rehearing was denied November 28, 1979. (A1.)

This Court has jurisdiction to review upon Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

The case brings here for review the questions:

1. Whether a State Supreme Court judgment (in a statutory administrative review of a State Board of Education ruling) holding the State Court had no jurisdiction to hear the case may be treated by a Federal Court as res judicata, not only of the jurisdictional issue, but also of issues going to the merits.

2. Whether a Federal Court in determining the effect of a State Court judgment for res judicata purposes, may disregard law settled in that State for 122 years, *i.e.*, that the Court-prepared syllabus, and not the opinion, states the law of the case and that

the opinion states only the individual views of its author.

3. Whether a Federal Court (by dint of enlarging the decision of the State Supreme Court in defiance of the syllabus rule) may hold a school district was dissolved eight years earlier (in 1970) in disregard of a separate State Court Declaratory Judgment of August 30, 1973, that (A39) "The Bratenahl Local School District legally exists" when that judgment is final and unmodified.

4. Whether it is consistent with a meaningful Federal judicial system to let a case make its way through courts and administrative agencies for nearly ten years without ever examining the merits—except once, and then disregarding the judgment based on the one review that involved study of the merits.

CONSTITUTION AND STATUTES INVOLVED

The case challenges the denial by a State of equal protection of the laws and due process under the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C. §§1985(3), 1981, 1982 and 1983-1988.

The Fourteenth Amendment, §1, says:

> "No State shall * * * deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although rights are claimed under the Civil Rights Act of 1871, that statute is not relevant in the present posture of the case and is not here copied because the case in both courts below went off on the issue of res judicata without reaching the Civil Rights Act.

STATEMENT OF THE CASE

This action, claiming rights under the Civil Rights Act of 1871, is, as the Court of Appeals noted, brought by Bratenahl Local School District Board of Education *and*:

> "12 individuals who were either Bratenahl taxpayers, students presently enrolled in the schools in Bratenahl, or former students of the Bratenahl school system, and who similarly claim that their civil rights have been violated by the compelled annexation of the Bratenahl School District to the Cleveland School District." 608 F.2d at 1128. (A4-5.)

The United States District Court granted Summary Judgment against Petitioners, without hearing any evidence or considering the merits of Petitioners' Civil Rights claims, on the ground that a decision of the Ohio Supreme Court is res judicata of the issues sought to be raised. The Court of Appeals affirmed on the ground that:

> "in *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education*, 53 Ohio St.2d 173, 373 N.E.2d 1238, cert. denied, 439 U.S. 865 (1978) (Bratenahl I), the Supreme Court of Ohio expressly held that '[t]he Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board.'" 608 F.2d at 1127. (A4.)

Had the Supreme Court of Ohio so held, this case would not be here.

It is here because the case was brought to a jarring halt by the Federal Court's enlargement of the Ohio Supreme Court judgment in disregard of the syllabus rule of 122 years standing.

By disregard of that rule the decision by the Ohio Supreme Court that the State Court *had no jurisdiction* of

a statutory administrative review proceeding is, *ipse dixit*, transformed into a decision on the merits of the case. *Where there is no jurisdiction, there can be no adjudication binding as res judicata—except only on the point that the court lacked jurisdiction.*

The tragedy is that the record presents a classic issue of res judicata by final judgment, unreversed, unmodified, and now unreviewable, entered on August 30, 1973, by the State Court in a separate Declaratory Judgment action adjudging, contrary to the holding of the Federal Court, that the Bratenahl School system was *not* dissolved in 1970, but to the contrary, and as a matter of law, "legally exists" *three years later.*

That judgment remains outstanding, unreviewed, and unmodified. It requires, if the rule of res judicata is not to be reduced to rubble, reversal of the judgment below and remand of the case to the District Court for trial on the merits of the tendered civil rights issues.

The State Court Declaratory Judgment action:

was filed in the State Court of Common Pleas on November 29, 1971. (A21.)

was dismissed by the Common Pleas Court on April 29, 1972. (A25.)

was reversed by the Franklin County Court of Appeals on January 9, 1973. (A28.) The Court of Appeals, despite (A35) "the persistence of the State Board in its efforts to avoid determination on the merits," adjudged (A33) "Bratenahl *in fact does exist* and is operating as a school district and at present maintains grades 1 through 12, inclusive * * *."*

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*Emphasis supplied throughout.

was denied review on April 30, 1973, by the Supreme Court of Ohio when it overruled the State Board's motion to certify the record for review. (A36.)

was remanded to the Common Pleas Court where on August 8, 1973, upon finding (A37) "that there is no genuine issue as to any material fact and that Bratenahl, the moving party is entitled to judgment as a matter of law," the trial court determined that (A37) "the Bratenahl Local School District does legally exist." Accordingly, "Bratenahl's Motion for Summary Judgment is SUSTAINED. Counsel for Plaintiff may prepare an Entry consistent with this decision." (A37.)

was finally disposed of by Judgment (A38) entered August 30, 1973, adjudging that (A39) "The Bratenahl Local School District legally exists * * *."

No review of that Judgment was sought. It remains oustanding, unmodified, and in full effect.

REASONS FOR ALLOWANCE OF WRIT

In the exercise of its supervisory power over the Federal courts, and to rescue the rule of res judicata from the confusion into which the decision below reduces that salutary rule, this Court should grant review. It then should summarily remand the case to the District Court with instructions to hear and pass upon the merits of Petitioners' civil rights claims.

Public policy emphasizes need for review. Here is a first-rate school system, successfully operating a fully integrated, quality educational program where more than 25% of the pupils are black. That system is threatened

with destruction solely as the result of grievous misconstruction by the Federal Court of State Court proceedings and in defiance of an outstanding final judgment that, on classic res judicata grounds, brands the decision below as hopelessly wrong.

If order is not restored to the rule of res judicata, Petitioners' civil right under the 1871 Civil Rights Act are destroyed.

Although, absent jurisdiction, there can be no adjudication on the merits, the astonishing, and sad, fact is that in this case—

1. Judgment That Court Had No Jurisdiction Has Been Treated as Decision on Merits

In the State administrative review proceeding that the Federal Court relied upon to establish res judicata, *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education* (1978), 53 Ohio St. 2d 173, 373 N.E.2d 1238 (hereinafter *Bratenahl I*) (A69), the Supreme Court of Ohio in the court-prepared syllabus—and, as will be seen in a moment, it is the syllabus and *not the opinion* that states what the Court has decided—held as follows:

"1. The refusal of the State Board of Education to grant a local school district an additional exception to the requirements of R.C. 3311.29 *does not constitute an 'adjudication'* within the meaning of R.C. 119.01(D).

2. In the absence of an 'adjudication' as defined in R.C. 119.01(D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County *lacks jurisdiction* under R.C. 119.12 to review actions taken by a state administrative agency. (*Fortner*

v. Thomas, 22 Ohio St.2d 13; *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150, approved and followed.)"

Since the State Court was *without jurisdiction, its judgment cannot possibly, on any reasoned basis, be res judicata* of any issue whatever—except only the issue of jurisdiction.

Jurisdiction lacking, whatever is said on the merits lacks the essential quality of adjudication.

The Federal Court, when it fell into its surprising holding, wiped out 122 years of settled Ohio law, as next will be pointed out:

2. Federal Court's Construction of State Decision Wipes Out 122 Years of Ohio Law

It has been law in Ohio since 1858 that the Ohio Supreme Court states the law in the court-prepared syllabus and *not in the opinion*. The opinion is only the private expression of its author. Although in its syllabus the Ohio Supreme Court held the Court *had no jurisdiction*, there crept into the opinion by Mr. Justice Sweeney the single sentence the Federal Court relied upon, namely:

> "the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board." 53 Ohio St. 2d at 187. (A75.)

How shocking the miscarriage, transforming this sentence into judgment, will be apparent when one notices that the Ohio Supreme Court's decision issued upon a 4 to 3 vote. Three justices dissented. (A75.) A sentence *no other justice subscribed to* has, in defiance of long-settled rule, been elevated to the status of a judgment of the Court.

The rule that it is the syllabus alone, and not the opinion, that states the law has been repeatedly upheld by this Court in dealing with decisions of the Ohio Supreme Court:

> *Beck v. Ohio* (1964), 379 U.S. 89, 93, Footnote 2, opinion by Mr. Justice Stewart;
>
> *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U.S. 437, 441-442, Footnote 3, opinion by Mr. Justice Burton;
>
> *Ohio v. Gallagher* (1976), 425 U.S. 257, 259, *per curiam.*

The rule was reaffirmed in *Cassidy v. Glossip* (1967), 12 Ohio St. 2d 17, 231 N.E.2d 64. The Ohio Supreme Court, in Syllabus 6, held:

> "6. The syllabus of a decision of the Supreme Court of Ohio states the law of the case."

In *State, ex rel. Donahey v. Edmondson* (1913), 89 Ohio St. 93, 107-108, 105 N.E. 269, 273, the Ohio Supreme Court refused to follow views stated in opinions, rather than in syllabi, in earlier cases because, as Judge Donahue observed:

> "Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, *it is merely the personal opinion of that judge.*" 89 Ohio St. at 107-108.

Similarly, because the court below had relied upon a paragraph in a Supreme Court opinion not carried into the syllabus, the Supreme Court of Ohio reversed in *Thackery v. Helfrich* (1931), 123 Ohio St. 334, 336, 175 N.E. 449, 450. Judge Robinson, observing that (p. 336) "This court * * * announces the law only through the syllabi of cases," explained that (p. 336) "Individual opin-

ions speak the conclusions of their writer," and wryly added:

"What useful purpose they [the opinions] serve is an open question." 123 Ohio St. at 336.

This strange rule is so fundamental to an understanding of the legal effect of *Bratenahl I* that it will be useful to note Mr. Justice Burton's explanation of it in *Perkins*, 342 U.S. at 441-442, as follows:

"In 1858 the Supreme Court of Ohio promulgated the following rule:

'A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the Judge assigned to deliver the opinion of the Court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the Court. And the syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein.' 5 Ohio St. vii.

This policy has been recognized by statute. Bates Ohio R.S. §427, as amended, 103 Ohio Laws 1913, §1483, and 108 Ohio Laws 1919, §1483. It appears now in Throckmorton's Ohio Code, 1940, §1483, as follows:

'Whenever it has been thus decided to report a case for publication the syllabus thereof shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court; and the report may be per curiam, or if an opinion be reported, the same shall be written in as brief and concise form as may be consistent with a clear presentation of the law of the case * * *. *Only* such

cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state.'

There are many references to this practice, both in the syllabi and opinions written for the Supreme Court of Ohio. Typical of these is the following:

'It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment. Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge.' * * *."

Under these circumstances it is a non sequitur to say the Ohio Supreme Court decision is res judicata of the issues here.

There was, to be sure, a second Bratenahl case in the Supreme Court of Ohio, not mentioned by the court below, namely *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education of Ohio* (1979), 58 Ohio St. 2d 189, 389 N.E.2d 503 (hereinafter *Bratenahl II*) (A79), a mandamus action brought by Bratenahl. In a per curiam opinion, which *is* the voice of the Court, the Ohio Supreme Court recognized that in the earlier Bratenahl case it *had adjudged*:

"the Court of Common Pleas *lacked subject matter jurisdiction* * * *." 58 Ohio St. 2d at 191. (A82.)

To hold an adjudication, lacking "subject matter jurisdiction," operates as res judicata of issues on the merits reduces to debris every known theory of res judicata.

In *Bratenahl II* the Supreme Court of Ohio did not hold that *the Court* had adjudged Bratenahl dissolved. To

the contrary, the Court correctly, and properly, distinguished what was in the *syllabus* from what was in the *opinion*. The Court said, referring to *Bratenahl I*:

> "The majority opinion in *State ex rel. Bd. of Edn., supra*, then concluded, at page 178, 'that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board.' " (A82.)

Even if the Court in *Bratenahl II* had attributed to *Bratenahl I* (A69) an adjudication that Bratenahl was dissolved, that would be immaterial. *Bratenahl I* stands or falls on its own bottom—i.e., syllabus. Subject matter jurisdiction, adjudged lacking, cannot be retroactively restored by subsequent comment.

The Federal Court, in addition, failed to note that—

3. Federal Decision Conflicts With State Court Declaratory Judgment

The Federal Court held Bratenahl dissolved despite the State Court Declaratory Judgment to the contrary.

The State Court Declaratory Judgment is a final judgment. It is unmodified. It continues outstanding. It is no longer reviewable.

This Court should say whether it is right that a Federal Court ride roughshod over a valid State judgment.

Consider also—

4. If Review Is Denied, Petitioners' Rights Will Never Have Been Judged on Merits

Save for the Declaratory Judgment of August 30, 1973, adjudging Bratenahl "legally exists," Bratenahl's rights have never been adjudicated on the merits.

For nearly ten years of litigation the strategy described by the State Court of Appeals, as "the persistence of the State Board in its efforts to avoid determination upon the merits" (A35), has proved successful.

Unless review be granted here, the rights of these Petitioners never will have been examined by any court—save only in the Declaratory Judgment the Federal Court jettisoned, without explanation.

The parallel that comes to mind is *Pyrot's* case in the *Penguin Island* reports of Anatole France, Book Six, Ch. X, where it developed that some (p. 239):

> "began to doubt whether it was not to their interest to believe in Pyrot's innocence rather than in his guilt, and thenceforward they felt a bitter anguish at the thought that the unhappy man might have been wrongly convicted * * *."

And so it came to pass that the *Pyrot* case was reopened and it fell to Mr. Justice Chaussepied (p. 242):

> "to examine it and discover its defects, in case any existed. Although as upright and honest as a man can be, and trained by long habit to exercise his magistracy without fear or favor, he expected to find in the documents to be submitted to him proofs of certain guilt and of obvious criminality."

And so he examined the documents (p. 242-243):

> "Numbered and initialed, they ran to the number of fourteen million six hundred and twenty-six thousand three hundred and twelve. As he studied them the judge was at first surprised, then astonished, then stupefied, amazed, and, if I dare say so, flabbergasted. He found among the documents prospectuses of new fancy shops, newspapers, fashion plates, paper bags, old business letters, exercise books, brown paper,

green paper for rubbing parquet floors, playing cards, diagrams, six thousand copies of the 'Key to Dreams,' but not a single document in which any mention was made of Pyrot."

So is it here.

Ten years of litigation, commencing February 9, 1970, have gone down the drain, victim of the State Board's "persistence" in avoiding decision on the merits.

The merits have never been studied—except in the Declaratory Judgment the Federal Court passed in silence.

CONCLUSION

The writ should issue to restore order to the judicial system, to rescue from destruction the rule of res judicata, and to establish that a final State judgment is to be respected in Federal Court.

Respectfully submitted,

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